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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DEBORAH KOONS GARCIA,
Plaintiff and Appellant,
v.
JERRY GARCIA ESTATE LLC et al.,
Defendants and Respondents.

A125892

(San Francisco City & County Super. Ct. No. CPF-09-509153)

Music legend Jerry Garcia died in August 1995, survived by his widow Deborah Koons Garcia (Mrs. Garcia), whom he had married in February 1994, and four daughters ranging in age from 31 years to seven years. They, along with another family member, were the beneficiaries of his estate. Following distribution of assets, disputes arose among the beneficiaries, disputes apparently resolved with the assistance of the Honorable Donald King, a retired justice of this court. As part of that resolution, the beneficiaries agreed to become members in a limited liability company, which company would hold and manage various assets, and which company would terminate on December 31, 2005, at which time the assets would be distributed. The wind-down of the company itself created disputes about the timing of the dissolution and how best to preserve and distribute the assets. Those disputes were resolved in an arbitration before Justice King, whose award, as pertinent here, declined to find Mrs. Garcia the prevailing party and refused her request for attorney fees. The superior court denied Mrs. Garcia's petition to "correct" Justice King's award, but rather "confirmed" it, thereby upholding the denial of attorney fees. Mrs. Garcia appeals. We affirm.

BACKGROUND

The Jerry Garcia Estate LLC And The Operating Agreement

Though the details are not in the record before us, it appears that the beneficiaries of Jerry Garcia's estate had disputes that were resolved with the assistance of Justice King. As he would later describe it, as mediator "[he] assisted the parties to reach agreement to join together in" a limited liability company. That limited liability company was formed on December 1, 2001; it was named the Jerry Garcia Estate LLC (the Company or the Estate LLC); and it had seven members: Mrs. Garcia; Annabelle Garcia-McLean, Clifford Garcia, Heather Garcia Katz, Sunshine May Walker Kesey, and Theresa Adams Garcia (collectively, respondents); and the Keelin Garcia Testamentary Trust (the Trust), a trust set up for Jerry Garcia's youngest daughter.[1] Among other things, the members of the Company agreed to "adopt and approve an Operating Agreement" to manage and administer certain assets, including those involving Jerry Garcia's name, likeness, personality rights, recorded performances, compositions, and artwork.

Such operating agreement came to be, a 31-page document signed by all members of the Company. The operating agreement provided that the day-to-day business of the Company would be run by a manager, and Timothy J. Jorstad became that manager. The operating agreement had the following three provisions pertinent here:

The first is paragraph 2.7, which provided that the Company would be dissolved on the earliest of four dates, one of which was December 31, 2005, the expiration date of the Company.

The second is paragraph 12.10, which provided that any dispute among the members of the Company or between a member and the Company "shall be submitted to the American Arbitration Association (AAA) for binding arbitration" and that the

[1] The Trust appears here in propria persona, through one of its co-trustees, David Hellman. The Trust has not filed any brief.

"arbitrator shall be Justice Donald B. King (Ret.) of the AAA, unless he is unavailable . . . ."

The third is paragraph 12.19, which provided that "In the event that any dispute between the Company and the Members or among the Members relating to or in connection with matters under this Agreement should result in arbitration, the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses . . . ."

The Arbitration

On September 13, 2006, Mr. Jorstad submitted to the members a detailed plan as to how he intended to wind down the Company and distribute its assets. The plan contained numerous—and distinct—proposed action items, among which was the proposed distribution of several licensing contracts the Company had executed that had obligations continuing beyond the term of the Company, and which contracts could have imposed personal liability on the members (third party contracts).

On October 30, 2006, respondents submitted to the AAA a demand for arbitration, requesting a declaration of rights and injunctive relief regarding the distribution of the third party contracts. The demand raised a single issue: "[s]hould [the Company] be compelled, while winding down, to continue to administer, implement, and manage" [the third party contracts] and continue in existence to accomplish the same?" Significantly, the demand for arbitration named only one respondent—the Company. It did not name Mrs. Garcia or the Trust, as neither had authority to control whether Mr. Jorstad would agree to continue his oversight of the third party contracts during the wind down.

On November 20, 2006, the Company submitted its response to demand and cross-demand for declaration of rights. The response named respondents, Mrs. Garcia, and the Trust as similarly situated cross-respondents. The reason, according to the response, was "to give all of the members an opportunity to be heard." The response asked Justice King to approve the manager's plan. The cross-demand did not request attorney fees.

Respondents filed a response to the cross-demand. Mrs. Garcia did not. Thus, under the AAA rules Mrs. Garcia would be deemed to have denied any claim in the cross-demand. (See AAA Commercial Arbitration Rules and Mediation Procedures (eff. June 1, 2009) Rule R-4 [cross-respondent may submit an answering statement; if no answering statement is submitted, cross-respondent is deemed to have denied the claim made against it].)

What Mrs. Garcia did file was a complaint in the Marin County Superior Court, filed on January 31, 2007. The complaint named respondents and the Company as defendants, and asserted claims for declaratory relief, breach of contract, and injunctive relief. The Company responded to Mrs. Garcia's complaint with a motion to compel arbitration and to stay. The Superior Court granted the motion, and ordered Mrs. Garcia's dispute(s) arising out of the operating agreement to be "arbitrated before the American Arbitration Association and Justice Donald B. King (Ret.) in accordance with the terms of that agreement."[2]

On June 8, 2007, counsel for Mrs. Garcia sent a lengthy letter to Justice King, a letter that dealt with several subjects. As germane to the issue here, the letter stated that with respect to the Company's cross-demand in arbitration naming Mrs. Garcia, "there was no motion seeking to compel [her] participation . . . and the Court's order does not address that proceeding. That technical issue aside, it is not our intention to participate in the arbitration." Two pages later, the letter concludes with this: "We recognize that, by not participating in the arbitration, we will not be able to present our views to the Arbitrator, and that is regrettable. On the other hand, the claimants themselves chose to initiate this proceeding without including our client, and so they can have no objection to our decision not to participate. The [Company], which joined us in the matter, did so merely in order to ensure that the Arbitrator had the opportunity to hear from all of the potentially interested parties. We have no quibble with their having done so, but the

[2] Mrs. Garcia apparently dismissed this action in early June 2007. The dismissal is not in the record.

burden and expense of participating in this proceeding are simply not justified, particularly in light of the unpredictability associated with future requests for attorneys' fees awards."

Apparently Mrs. Garcia had a change of heart, as reflected in a June 25, 2007 letter from counsel for the Company to Justice King, which begins as follows: "The following discussion represents a collaborative effort by [respondents] and Mr. Jorstad to present you with an agreed upon statement of issues and proposed resolutions for your consideration in advance of further proceedings. Our purpose is to provide you with a supplement and update to the respective statements of the parties previously submitted to you in the course of this Arbitration. Our immediate objective is to elicit your ruling with respect to the arbitrability of the issues we believe remain to be resolved.

"Because you are very familiar with the facts at hand and the controlling Operating Agreement, we have not presented detailed arguments concerning why the issues discussed below are considered arbitrable. In the event you desire a further discussion concerning why any specific issue is considered within the scope of the arbitration clause, or if Mrs. Garcia elects to participate and submits objections, counsel for [respondents] has asked that they be permitted to submit a supplemental discussion.

"Since our conference call on June 8, 2007, Mrs. Garcia's counsel, Jonathan Bass, has advised that he may indeed participate in the pending arbitration proceeding on her behalf after all, but he has asked that the [Company] and the other members agree that all parties will bear their own costs and fees and that no fee apportionment award will be sought. Mr. Jorstad did not believe it appropriate to agree to that request and declined it. Counsel for [respondents], which consists of all of the Garcia heirs other than Mrs. Garcia and the Keelin Garcia Trust, also declined the request."

The arbitration took place on December 3, 4, and 5, 2007. Justice King heard testimony from many witnesses, and numerous exhibits were introduced. There was testimony on technical matters such as trademarks. Mr. Jorstad, the manager, testified at length about his proposed plans. He also testified about "threats of litigation" that Mrs. Garcia had made against him.

Following the hearing, all parties submitted lengthy post-arbitration briefs. On May 21, 2008, Justice King issued his "Interim Award." It began as follows:

"The historical facts are known to the parties and will not be repeated here. Suffice it to say that the heirs of Jerry Garcia formed the Jerry Garcia Estate LLC, a California limited liability company to market and manage the intellectual property rights they inherited from his estate. The Operating Agreement provided for a five year life for the LLC, which has long since passed, and this arbitration is brought to wind up and terminate the LLC and determine the process of accomplishing that termination. Certain intellectual property assets of the LLC have already been transferred to the members of the LLC and are not the subject of this arbitration.

"The primary dispute between the Claimants and Cross-Respondent Deborah Koons Garcia, as members of the LLC, is whether there should be an immediate termination of the LLC and distribution of the remaining intellectual property interests or rights to the members, or whether the LLC should continue in some fashion. This dispute arises because of differences in position about whether the LLC, as part of its winding down, should remain in existence to carry out the registration of foreign trademarks into the names of the members and to carry out digitalization of master tapes of Jerry Garcia's music presently stored at the Hollywood Vault. The Manager of the LLC, although a party to this arbitration, is really seeking instructions and direction from the Arbitrator as to what action its Manager should take given significant differences between the members of the LLC.

"There is no basis for continuing the LLC in operation beyond the winding up of its operations and distribution of its assets to the members. The term of the life of the LLC has long since passed and the Arbitrator has no authority under the Operating Agreement of the LLC or the law to continue the existence of the LLC, except for the purpose of winding down to termination. This arbitration can only direct what is to be done to terminate the LLC. Future problems or issues between its members will have to be resolved by their agreement or through proceedings in the Superior Court. The remaining assets of the LLC must be distributed to the members as quickly as possible

without damage to their value. Claimants seek to have the intellectual property rights distributed to another entity, but there is no authority for the Arbitrator to do anything other than require a termination of the LLC and distribution of its assets directly to the members in their appropriate percentage interests. The Arbitrator has no authority to distribute these assets to another entity or to rule their future use is subject to majority rule as sought by Claimants. The Arbitrator sought suggestions from counsel as to what he might do to lessen the likelihood of future disputes between the members. Neither counsel nor the Arbitrator can lessen the conflict between the parties and absent agreement, which is unlikely, disputes arising after the dissolution of the LLC will have to be decided by a court, absent an agreement by the parties to a resolution by arbitration."

We pause from the chronology to note that as of May 21, 2008, the date of the interim award, Mrs. Garcia had not filed any claim in the arbitration, let alone one claiming any affirmative relief. Most significantly, as of that time she had never requested fees from any party—not in writing, not orally.

Mrs. Garcia's Request for Attorney Fees

On June 12, 2008, Mrs. Garcia filed an "Application for an Award of Attorneys' Fees and Costs," seeking $404,697.42 in "legal expenses" and an additional $19,522.50 in connection with the fee application itself. Though Mrs. Garcia's application was lengthy, her argument was straightforward: she was the prevailing party in the arbitration and was thus entitled to attorney fees under paragraph 12.19 of the operating agreement. Respondents filed a memorandum which, as pertinent here, opposed Mrs. Garcia's request for fees. Mrs. Garcia filed a memorandum in response, which among other things asserted that the amount of being sought in connection with the fee application was now $40,676.29.

On September 11, 2008, Justice King heard extensive argument from counsel, argument that lasted over two and one-half hours.

On September 30, 2008, Justice King issued his final award. It was detailed indeed, over seven pages in length, the first five of which set forth Justice King's

conclusion on the essential issues in the arbitration. The award then addressed Mrs. Garcia's application for attorney fees, saying this:

"[Mrs. Garcia] seeks attorney fees and costs against Cross-Respondents Annabelle Garcia-McLean, Clifford Garcia, Heather Garcia Katz, Sunshine May Walker Kesey and Theresa Adams Garcia . . . contending entitlement as the prevailing party in this arbitration pursuant to section 12.19 of the Operating Agreement for the Estate LLC. Neither the Estate LLC nor the other Cross-Respondents seek fees and costs. The Estate LLC takes no position on Mrs. Garcia's request for fees and costs while the Cross-Respondent Claimants oppose the request.

"On the issue of attorney fees and costs the positions of the parties about the nature of this arbitration is akin to the story in the 1950 movie Rashomon where four people seeing the same incident see if [*sic*] very differently. Mrs. Garcia sees the arbitration as a contest between her and the Cross-Respondent Claimants, while the latter view the arbitration as simply an opportunity for each member of the Estate LLC to comment and take positions on the plan of dissolution of the Estate LLC as proposed by the manager.

"As stated above, the Cross-Claim of the Estate LLC was brought seeking instructions and directions from the Arbitrator as to what action the manager should take in winding up the Estate LLC given significant differences of view among the members and a threat of litigation against the manager. As a matter of pleadings neither Mrs. Garcia nor the Cross-Respondent Claimants brought any claims against each other. It certainly is true they had very different positions about the plan proposed by the Manager to wind down the Estate LLC and the Arbitrator did accept the position of Mrs. Garcia as to two of the major issues in dispute.

"The Arbitrator has been involved with all of these parties since the creation of the LLC, including having been the mediator who assisted the parties to reach agreement to join together in an LLC. Given the conflict and contentiousness between the parties, the Manager of the LLC made a wise decision to file the declaratory relief request for instructions in the arbitration. The Arbitrator is certain that absent this arbitration there

would have been prolonged and expensive litigation had the Manager gone forward with his plan. Under all of these circumstances as a matter of both law and equity, each party shall bear their own attorney fees and costs."

The Proceedings in Superior Court

On January 13, 2009, Mrs. Garcia filed in the San Francisco Superior Court a petition to correct the arbitration award. The petition contended that Justice King exceeded his powers by refusing to award Mrs. Garcia attorney fees "as the prevailing party." The petition was accompanied by the declaration of Mrs. Garcia's counsel which included 27 exhibits, many of them voluminous. All told, the moving papers in Mrs. Garcia's petition were 2066 pages.

Respondents filed opposition to Mrs. Garcia's petition and a request to confirm the award. Following Mrs. Garcia's reply, the matter came on for hearing on March 26, 2009 before the Honorable Peter J. Busch, an experienced law and motion judge who, the transcript of the hearing reveals, was most conversant with the voluminous papers before him—and who took issue with Mrs. Garcia's counsel's reading of the record. On May 1, 2009, Judge Busch entered an order that provides in its substance as follows: "The Petition to Correct is denied. The Arbitration Award is confirmed. Respondents' request for fees is denied. [¶] Petitioner's claim for fees as a prevailing party under the parties' agreement was presented to the arbitrator and denied by him on the merits. The arbitrator did not designate Petitioner as a prevailing party under the agreement and rejected either or both of Petitioner's interpretation of the agreement, and of the facts."

Mrs. Garcia filed a timely notice of appeal, and asserts three arguments, that: (1) she was the prevailing party in the arbitration; (2) Justice King exceeded his powers by refusing to award her attorneys fees and costs; and (3) Justice King relied on illegitimate reasons to deny her fees and costs.

DISCUSSION

The Standard of Review

Eschewing all meaningful reference to the record—where, as noted, Judge Busch found that Justice King "did not designate" Mrs. Garcia as the prevailing party—Mrs. Garcia asserts that the standard of review is de novo. In her words: "an arbitration award can be judicially corrected if the arbitrator has exceeded the power vested in him by the arbitration agreement. An arbitrator exceeds his power when he 'remakes the contract' by 'act[ing] in a manner not authorized by the contract or by law.' (Quoting *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.) ' "The question is whether the award is 'so *outré* that we can infer that it was driven by a desire to do justice beyond the limits of the contract.' " ' (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 953.) On appeal, the Court 'conducts a de novo review, independently of the trial court, of the question whether the arbitrator exceeded the authority granted him by the parties' agreement to arbitrate.' (*Id.* at p. 945.)"

The two cited cases have nothing to do with the issue here. And Mrs. Garcia's claimed standard of review is wrong. The standard of review applicable here is that set forth, for example, by our colleagues in Division Three in *Pierotti v. Torian* (2000) 81 Cal.App.4th 17. *Pierotti* presented the converse of the claim here, the claim there being that the arbitrator had erred in finding plaintiff a prevailing party and awarding him attorney fees. Division Three not only affirmed, it concluded that the appeal was frivolous, and remanded for a determination of the amount of fees expended in defending against that appeal. Doing so, it began its analysis this way:

"In *Moncharsh v. Heily & Blase* [(1992)] 3 Cal.4th 1 (*Moncharsh*), our Supreme Court made it clear that the grounds for judicial review of a contractual arbitration award are extremely limited. Under *Moncharsh*, we cannot review the merits of the controversy, the arbitrator's reasoning, or the sufficiency of the evidence supporting the award. (*Id.* at p. 11.) Even 'an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.' (*Id.* at p. 33.) Code of Civil Procedure sections 1286.2 and 1286.6 provide the only grounds for challenging an

arbitration award. (3 Cal.4th at p. 33.) [¶] In reviewing a judgment confirming an arbitration award, we must accept the trial court's findings of fact if substantial evidence supports them, and we must draw every reasonable inference to support the award. [Citations.]" (*Pierotti v. Torian, supra,* 81 Cal.App.4th at pp. 23-24.)

Our Supreme Court has stated the applicable standard this way: "When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. (*Moshonov v. Walsh* [(2000)] 22 Cal.4th [771] at pp. 775-777; *Advanced Micro Devices, Inc. v. Intel Corp.* [(1994)] 9 Cal.4th [362] at pp. 372-375; *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 28.) Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for ' "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." ' (*Moshonov v. Walsh*, at pp. 775-776, quoting *Moncharsh v. Heily & Blase, supra,* at p. 28.)" (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184.)

We ourselves described the applicable law less than six months ago, in *San Francisco Housing Authority v. Service Employees Internat. Union Local 790* (2010) 182 Cal.App.4th 933. There, we reversed the Superior Court that had vacated an award, and concluded that the arbitrator's award did not exceed her powers. We began our analysis with this distillation:

" 'Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation. [Citations.]' [Citation.] Inherent in the broad powers of the arbitrator 'is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous

conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for " '[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.' " [Citation.]' [Citation.]" (*San Francisco Housing Authority v. Service Employees Internat. Union Local 790, supra,* 182 Cal.App.4th at p. 943.)

Those, then, are the rules of review applicable here. They easily defeat Mrs. Garcia's claims.

Judge Busch's Ruling is Supported by Substantial Evidence

Here, in denying Mrs. Garcia's petition to correct the award, Judge Busch made factual findings that Mrs. Garcia's claim for fees was presented to Justice King and rejected. In Judge Busch's words, Justice King "did not designate [Mrs. Garcia] as a prevailing party under the agreement. . . ." That finding is supported by substantial evidence. That ends the matter.

Mrs. Garcia's arguments are not to the contrary. Not her legal arguments. Not her factual arguments.

Justice King Did Not Exceed His Powers

In his award, Judge King explicitly recognized that Mrs. Garcia had sought fees and costs against respondents and claimed to be the putative "prevailing party in this arbitration pursuant to section 12.19 of the Operating Agreement for the Estate LLC." Then, after describing the parties' respective positions for and against Mrs. Garcia's request for fees—and given his decisions on the numerous cross-demand issues—Justice King flatly rejected her claim that she was the prevailing party: "Under all of these circumstances as a matter of both law and equity, each party shall bear their own attorney fees and costs." How an arbitration award that rejects a claim for fees that was put before the arbitrator exceeds the arbitrator's powers is difficult to fathom. In any event, Mrs. Garcia's cited authority does not support her.

In claimed support of her position, Mrs. Garcia relies on two cases involving arbitrations: *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782 (*Moore*) and

DiMarco v. Chaney (1995) 31 Cal.App.4th 1809 (*DiMarco*).[3] Neither is availing. Indeed, on an objective reading, both are devastating. The Supreme Court's introductory description in *Moore* says it all:

"The trial court ordered this dispute over the validity and enforcement of secured loan agreements to contractual arbitration pursuant to predispute arbitration clauses in the loan agreements. The arbitration panel decided generally for plaintiffs, awarding them all the relief they had sought, at least in the arbitration itself, on their contract causes of action. Because the loan agreements and deeds of trust contained provisions entitling defendant to attorney fees on these causes of action had defendant prevailed, plaintiffs themselves were arguably entitled to recover such fees as costs under Civil Code section 1717. Without making a finding as to the existence or nonexistence of a prevailing party, however, the arbitrators instead decided that each party was to bear its own attorney fees.

"The superior court denied plaintiffs' motion to correct the award (Code Civ. Proc., § 1286.6) to include an award of attorney fees; the Court of Appeal affirmed. We conclude the lower courts acted correctly: Where the entitlement of a party to attorney fees . . . is within the scope of the issues submitted for binding arbitration, the arbitrators do not 'exceed[] their powers' (§§ 1286.2, subd. (d), 1286.6, subd. (b)), as we have understood that narrow limitation on arbitral finality, by denying the party's request for fees, even where such a denial order would be reversible legal error if made by a court in civil litigation." (*Moore, supra*, 22 Cal.4th at p. 784, fn. omitted , citing *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 28, & *Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at pp. 376-381.)

Here, as did the plaintiffs in *Moore,* Mrs. Garcia asked Justice King to designate her the prevailing party. Here, like the arbitrator in *Moore*, he did not. *Moore* is on point. And dispositive.

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[3] Mrs. Garcia also cites *Hsu v. Abbara* (1995) 9 Cal.4th 863, which did not involve an arbitration. It is also distinguishable because the defendant there, unlike Mrs. Garcia here, actually filed a cross-claim.

DiMarco is similarly unhelpful. The dispute there arose out of a real estate purchase agreement by which DiMarco was to acquire property from Chaney, which DiMarco sought to rescind. The arbitrator rejected his claim, and found for Chaney. The arbitrator also denied both sides' requests for fees. Chaney sought to correct the award, and the superior court remanded the matter to the arbitrator for clarification as to whether he considered and applied Civil Code section 1717. The arbitrator responded that he had, but concluded that he had discretion to deny attorney fees, despite his determination that Chaney was the prevailing party. (*DiMarco, supra,* 31 Cal.App.4th at p. 1812.)

Chaney filed a motion to correct the award, which the trial court granted. The Court of Appeal affirmed, holding that the arbitrator exceeded his authority by refusing to make an award of attorney fees after designating a prevailing party. (*DiMarco, supra,* 31 Cal.App.4th at pp. 1813, 1815.) Even so, *DiMarco* does not avail Mrs. Garcia, but respondents, the Court of Appeal there noting that "[h]ad the arbitrator found neither DiMarco nor Chaney was the prevailing party, the arbitrator could have declined to make any award of attorney fees." (*DiMarco, supra*, 31 Cal.App.4th at p. 1815.) That is what Justice King did here.

In any event, *DiMarco* is easily distinguishable from the situation here, as the Supreme Court made clear in *Moore* by its description of—and distinction of—*DiMarco*, described as a case "when the arbitrator designates a prevailing party and the contract expressly calls for such prevailing party to be awarded attorney fees." (*Moore, supra,* 22 Cal.4th at p. 788.) By contrast, "Here [i.e., in *Moore*], the arbitrators did not designate plaintiffs as the prevailing parties either expressly or impliedly." (*Id.* at pp. 788-789.) Rather, the "arbitrators were asked, but failed" to designate the party seeking fees as the prevailing party. "That failure amounted at most to an error of law on a submitted issue, which does not exceed the arbitrators' powers under the holding of *Moncharsh, supra,* 3 Cal.4th at p. 28." (*Id.* at p. 788.)

Though perhaps unnecessary to our decision on this issue, we close with the observation that Mrs. Garcia does not demonstrate that she was the "prevailing party." It is true, as Justice King noted, that Mrs. Garcia prevailed on "two of the major issues" in

the arbitration. That is a far cry from showing that she prevailed—or that respondents did not. A few examples should suffice.

As part of his plan, Mr. Jorstad proposed a third party attorney to effect assignments of foreign trademark registrations held in the Company's name.

One of the issues in the Company's cross-demand involved the estimated cost of effecting foreign trademark registration assignments as quoted by the Company's previous trademark attorney. A bid for this work was obtained from another attorney at a greatly reduced cost, and Justice King's award authorized Mr. Jorstad to switch attorneys to accomplish the foreign trademark registration assignments at such reduced cost. It was Mr. Jorstad and respondents—not Mrs. Garcia—who initially flagged the expense item for later attention during the arbitration.

Moreover, while Mrs. Garcia was successful on "two of the major issues" in the arbitration, she was also unsuccessful on others. For example, one issue in the cross-demand involved Mrs. Garcia's position that the Company distribute liabilities associated with third party claims then pending against it. Justice King ordered the Company to attempt to resolve those liabilities, in essence rejecting Mrs. Garcia's position. Similarly, Mrs. Garcia demanded that the Company archive various music recordings of Jerry Garcia before distributing the rights in them to the members, and insisted that the Company use her hand-picked archivist to complete the project. Justice King rejected Mrs. Garcia's position, leaving the decision on archivist selection to Mr. Jorstad. Mrs. Garcia was also unsuccessful in her attempt to convince Justice King to order a change in the firm the Company had selected to handle substantial artist and publishing royalties.

Justice King Did Not Rely on Illegitimate Reasons

Mrs. Garcia's final argument, set forth in less than a page, is that Justice King "relied on illegitimate reasons to deny Mrs. Garcia fees and costs." This brief argument is premised on the assertion that Justice King denied Mrs. Garcia attorney fees because of "his belief that the manager of the Company had performed a useful service by filing his Cross-Demand, thus enabling the parties to arbitrate their disputes and avoid 'prolonged

and expensive litigation.' " Nowhere in the award did Justice King state that this was the sole basis for rejecting Mrs. Garcia's fee request. In any event, and as noted, Justice King decided some substantive issues against Mrs. Garcia, and the decision not to recognize Mrs. Garcia as the prevailing party is consistent with that outcome.

For each and all of the reasons set forth above, we conclude that Judge Busch properly rejected Mrs. Garcia's petition to correct the award—and properly confirmed it. We also conclude that Justice King did not exceed his powers. But even assuming that Justice King had not acted appropriately, that he had done something that would have been reversible error in a legal proceeding, it would not be reversible error here, not in light of the entrenched rule of arbitral finality. As the Supreme Court has put it, an arbitrator does not exceed his power "as we have understood that narrow limitation on arbitral finality, by denying the party's request for fees, even where such a denial order would be reversible legal error if made by a court in civil litigation." (*Moore, supra,* 22 Cal.4th at p. 784; accord *Kahn v. Chetcuti* (2002) 101 Cal.App.4th 61, 67; *Nogueiro v. Kaiser Foundation Hospitals* (1988) 203 Cal.App.3d 1192, 1195-1196 [arbitrator may base decision on broad principles of justice and equity, even if legally erroneous].)

Respondents Are Not Entitled To Any Attorney Fees

In a one-page argument respondents claim that they prevailed "in the new proceeding brought by Mrs. Garcia in the trial court below to 'correct' the Award," and thus "[i]n the event this Court upholds the trial court's order, . . . [respondents] respectfully request[] an award of their fees and costs as against Mrs. Garcia associated with their participation in this appeal." Judge Busch rejected respondents' claim to fees below, and they did not appeal. We treat the request as waived.

DISPOSITION

The order confirming the arbitration award is affirmed. Respondents shall recover costs on appeal.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.